

³ See 2014 Quadrennial Regulatory Review, Second Report and Order, 31 FCC Rcd 9864 (2016) (“*Quadrennial Review Order*”); Petition for Reconsideration of the National Association of Broadcasters, MB Docket No. 14-50 *et al.* (filed Dec. 1, 2016) (“NAB Recon Petition”).

highly competitive New York media marketplace or impairing the viability of diverse sources of information in that market.

In granting a temporary waiver of the NBCO rule so that Fox and News Corporation could maintain ownership of their respective New York media outlets, the Bureau in August 2014 reasoned that the Commission had “just begun a proceeding that bears directly on the combination at issue here,” observing that the *2014 Quadrennial Review* sought comment on whether to revise the NBCO rule in light of marketplace developments.⁴ The Bureau stated that the waiver would be in effect at least until “90 days after the effective date of an order” on the NBCO rule in the *2014 Quadrennial Review*, at which time Fox would be expected to either “comply with the rule in effect at that time” or “file a new request for a waiver of such rule.”⁵ The Bureau’s decision recognized that it would be “inappropriate” to decide the ultimate fate of this “unique” cross-ownership of media outlets when the full Commission had just initiated an active, pending rulemaking concerning the NBCO rule itself.⁶

⁴ *2014 Bureau Decision*, 29 FCC Rcd at 9579.

⁵ *Id.* The effective date of the *Quadrennial Review Order* was December 1, 2016, meaning that the 90-day period described in the *2014 Bureau Decision* ends on March 1, 2017. *See 2014 Quadrennial Regulatory Review*, 81 Fed. Reg. 76220 (Nov. 1, 2016). As noted, the Bureau gave Fox two options to pursue at the end of that 90-day period: *either* come into compliance with the then-current NBCO rule *or* file a new waiver request. *2014 Bureau Decision*, 29 FCC Rcd at 9579. With this request for a new temporary waiver, Fox is pursuing the latter option. Accordingly, as contemplated by the *2014 Bureau Decision*, common ownership of the Stations and the *Post* will continue to be authorized unless and until the Commission declines to grant the requested waiver. *Id.* Out of an abundance of caution, however, Fox requests, to the extent necessary, a temporary extension of the waiver granted in the *2014 Bureau Decision*. Under Commission precedent, the existing waiver will remain in effect while this request remains pending. *See In re Counterpoint Communications, Inc. (Transferor) and Tribune Television Co. (Transferee)*, 20 FCC Rcd 8582, 8590 (2005) (stating that inaction by the Commission in the face of a pending extension request “allow[s] waivers to remain in force”). *Id.*

⁶ *2014 Bureau Decision*, 29 FCC Rcd at 9579. (“In light of the Commission’s having just begun a proceeding that bears directly on the combination at issue here, which is admittedly unique (among other things, two television stations, one newspaper, the number one media market), we believe it is inappropriate to make a final ruling on Fox’s request for a permanent waiver at this time.”).

When the Commission adopted the Second Report and Order (the “Order”) in the *2014 Quadrennial Review* in August 2016, by a 3-to-2 vote it declined to amend or eliminate the NBCO rule.⁷ The two dissenting commissioners, Commissioner (now Chairman) Pai and Commissioner O’Rielly, left no doubt that they would have eliminated the NBCO rule in light of changed circumstances in the media marketplace since the rule’s adoption in 1975.⁸ The dissenting commissioners’ views echoed those of the full Commission in 2003 and of the Third Circuit one year later: the Commission concluded that the NBCO rule should be eliminated because, in its current form, it was “not a reasonable means to accomplish the public interest purposes to which [it is] directed,” including competition, diversity, and localism.⁹ Meanwhile, the Third Circuit held that “reasoned analysis supports the Commission’s determination that the blanket ban on newspaper/broadcast cross-ownership was no longer in the public interest.”¹⁰ On December 1, 2016 – affirming points made by Chairman Pai and Commissioner O’Rielly in 2016, the Third Circuit in 2004, and the full Commission in 2003 – the National Association of Broadcasters sought reconsideration of the Order, asserting that it was improper for the Commission to retain the NBCO rule.¹¹ Meanwhile, as of January 20, 2017, the composition and leadership of the Commission has changed such that the two commissioners who supported

⁷ *Quadrennial Review Order*, 31 FCC Rcd at 9912.

⁸ *Id.*, Dissenting Statement of Commissioner Ajit Pai (criticizing the Commission for “doubling down” on the NBCO rule and Dissenting Statement of Commissioner Mike O’Rielly (arguing that the NBCO rule “create[s] artificial silos that are preventing broadcasters and newspapers from competing with new entrants and serving the needs of consumers.”).

⁹ *In re 2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd 13620, 13621-13627 (2003) (*rev’d and remanded*, *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004) (“*Prometheus*”).

¹⁰ *Prometheus*, 373 F.3d at 398.

¹¹ NAB Recon Petition at 14-25. *See also* Comments of News Media Alliance in Support of NAB Petition for Reconsideration, MB Docket No. 14-50 *et al.* (filed Jan. 24, 2017) (urging the Commission to reconsider its decision to maintain the NBCO rule).

elimination of the NBCO rule in the *2014 Quadrennial Review* proceeding now form a majority of Commission's three members.

Given that the change in the Commission's composition occurred while NAB's petition for reconsideration is pending, it is reasonable for the Bureau to view the continued validity of the NBCO rule as under active reconsideration by the Commission.¹² The same rationale that led the Bureau to defer substantive evaluation of common attributable interests in the *Post* and the Stations in 2014 thus counsels continued deference to the Commission's broader evaluation of the NBCO rule itself. As before, once the Commission has acted on the pending petition for reconsideration, the Bureau should afford Fox 90 days to ensure it is in compliance with the then-current rules or to file a new waiver request.

For the reasons Fox has previously detailed, a permanent waiver permitting continued ownership of the *Post* by News Corporation and of the Stations by Fox would be justified even under the existing NBCO rule.¹³ Conducting a full-blown analysis of the merits of the cross-ownership of these media outlets now, however, would require the expenditure of Bureau and other stakeholder resources to consider a question that may be rendered moot by action of the

¹² See also Alayna Treene, *FCC Chairman's Plans for Media*, Axios (Feb. 16, 2017) (reporting on interview of FCC Chairman Pai with Fox Business Network and stating that Chairman Pai "said he wants to modify media ownership laws" and "[o]ne major rule he's looking to change prohibits local consolidation of multiple media platforms, like a local newspaper buying a local television station.").

¹³ Fox incorporates those showings herein by reference. See, e.g., Consolidated Opposition of Fox Television Stations, Inc. to Petitions to Deny, File Nos. BRC DT-20150202ACT and BRC DT-20150202ACP (filed June 1, 2015), at 8-11 (explaining grounds for continued waiver and finding that "[t]he current waiver is justified not only by the pendency of the 2014 Quadrennial Review but also by the Commission's prior determination that the specific waiver at issue served the public interest by protecting the financially vulnerable New York Post while not harming diversity given the unique number of media voices that serve the incredibly diverse New York market"); Applications for Transfer of Control of Fox Television Stations, Inc. from K. Rupert Murdoch to Fox Entertainment Group, Mem. Op. & Order, 21 FCC Rcd 11499, 11500-11502 (summarizing Fox's filings in support of waiver) (2006); K Rupert Murdoch, Mem. Op. & Order on Recon., 24 FCC Rcd 5824, 5826-5827 (2009) ("*Murdoch Recon.*") (summarizing Fox's filings in support of waiver).

full Commission on the NBCO rule. It would serve little purpose to expend resources taking up the merits of a permanent waiver request when the rule may be eliminated and – even if not eliminated – when the criteria that the Commission would use to consider a permanent request may well change as part of the reconsideration.¹⁴

Preserving the *status quo* by granting the requested waiver will prevent unnecessary disruption to media diversity in the New York market, as the Commission has recognized in past decisions to waive the NBCO rule’s application to the cross-ownership of the Stations and the *Post*.¹⁵ In a media market featuring an “extreme diversity of voices” like New York,¹⁶ temporarily maintaining the *status quo* better serves the public interest than prematurely breaking up an ownership structure that has produced recognized public interest benefits and that may well be permissible when the Commission takes up the pending petition for reconsideration concerning the NBCO rule.

¹⁴ The Commission recently has cited a similar rationale in asking the D.C. Circuit to hold in abeyance certain cases challenging orders to which the new Commission majority dissented. *See, e.g.*, Motion of FCC to Place This Case in Abeyance, United States Telecom Ass’n. v. FCC, USCA Case No. 15-1414, Document # 1659750 (filed Feb. 6, 2017) (“The Federal Communications Commission respectfully requests that the Court place this case in abeyance because of recent changes in the membership and leadership of the Commission. Holding this case in abeyance will allow the newly constituted Commission an opportunity to determine how it plans to proceed with respect to this case, including the rules and declaratory ruling that were adopted in the orders under review.”).

¹⁵ *See, e.g.*, 2014 Bureau Decision, 29 FCC Rcd at 9579.

¹⁶ *Murdoch Recon*, 24 FCC Rcd at 5829.

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CERTIFICATE OF SERVICE

I, Michael Beder, an associate at Covington & Burling LLP, hereby certify that on this 28th day of February, 2017, I caused a copy of this Request for Waiver to be served by U.S. First Class mail, postage prepaid, upon the following:

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